No. 13,237

IN THE

United States Court of Appeals

For the Ninth Circuit

ANNIE ELLENBERGER,
Appellant,

vs.

EARL WARREN, JAMES R. AGEE, A. F. BRAY, RAYMOND E. PETERS and EDMUND G. BROWN,
Appellees.

APPELLEES' REPLY BRIEF AND MOTION TO DISMISS.

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I.

HISTORY OF LITIGATION.

This matter was initiated in the District Court of the United States for the Northern District of California, Southern Division, by the filing of a complaint. On behalf of the above-named appellees a motion to dismiss was filed, which was granted on May 9, 1951, by Honorable George B. Harris, United States District Judge.

The plaintiff subsequently filed a petition for a rehearing of the motion to dismiss, which was likewise dismissed upon order of the Court, and the plaintiff

then moved for a default judgment herein, which application for default was dismissed on October 3, 1951. There then followed an appeal to this Court.

II.

ARGUMENT.

We have designedly omitted from this brief any statement of facts because no factual record was made below in the District Court. The matter was heard solely upon the pleadings which have been certified to this Court and upon the argument of counsel. There is nothing before this Court for consideration other than the question of whether or not the District Court properly granted the various motions to dismiss made on behalf of the appellees. It is our contention that those motions were properly granted.

All of the complaints filed in the District Court were vague and indefinite, both as to the legal grounds upon which suit was brought and the remedy sought against the appellees.

A motion to dismiss lies where the facts pleaded in the complaint fail to state a claim upon which relief can be granted.

Federal Rules of Civil Procedure, Rule 12 (b) (6).

NO FEDERAL QUESTION IS HERE INVOLVED.

A motion to dismiss lies where plaintiff has failed in his complaint to state facts sufficient to give jurisdiction to the Federal Court over the subject matter of the action.

Federal Rules of Civil Procedure, Rule 12 (b) (1).

THESE APPELLEES ARE IMMUNE FROM SUIT.

As is alleged in the complaint, and as this Court can notice judicially, no cause of action lies against State officers for wrongs done in the course of official conduct.

See:

Spalding v. Vilas, 161 U.S. 483,

and

Cooper v. O'Connor, 99 Fed. (2d) 135, 118 A.L.R. 1440.

As set forth in the *Spalding* case (page 498):

"* * * the same general considerations of public policy and convenience which demand for judges of courts of superior jurisdiction immunity from civil suits for damages arising from acts done by them in the course of the performance of their judicial functions, apply to a large extent to official communications made by heads of Executive Departments when engaged in the discharge of duties imposed upon them by law. The interests of the people require that due protection be accorded to them in respect of their official acts * * * the head of an Executive Department, keep-

ing within the limits of his authority, should not be under an apprehension that the motives that control his official conduct may, at any time, become the subject of inquiry in a civil suit for damages."

THIS IS AN UNAUTHORIZED SUIT AGAINST A STATE.

While ostensibly the complaints filed below purport to be directed toward individual defendants, they are, in fact, an effort to direct Federal action to remove certain officials from State office and to compel certain action upon the part of the judicial branch of the State of California. Such an action violates the Eleventh Amendment of the United States Constitution.

See:

In re Ayers, 123 U.S. 443, 505;
Smith v. Reeves, 178 U.S. 436, 447 and 448.

In the *Ayers* matter, it is stated (page 505):

"To secure the manifest purposes of the constitutional exemption guaranteed by the 11th Amendment requires that it should be interpreted, not literally and too narrowly, but fairly, and with such breadth and largeness as effectually to accomplish the substance of its purpose. In this spirit it must be held to cover, not only suits brought against a State by name, but those also against its officers, agents, and representatives, where the State, though not named as such, is nevertheless, the only real party against which alone in fact the relief is asked, and against which the judgment or decree effectively operates."

See, also:

Missouri v. Fiske, 290 U.S. 18, 25 and 26,

where it is stated:

"The Eleventh Amendment is an explicit limitation of the judicial power of the United States. 'The judicial power of the United States shall not be construed to extend to any suit in law or equity commenced or prosecuted against one of the United States by citizens of another State or by citizens or subjects of any foreign State.' However important that power, it cannot extend into the forbidden sphere. Considerations of convenience open no avenue of escape from the restriction. The 'entire judicial power granted by the Constitution does not embrace authority to entertain a suit brought by private parties against a State without consent given.' *Ex parte New York,* 256 U.S. 490, 497. Such a suit cannot be entertained upon the ground that the controversy arises under the Constitution or laws of the United States. *Hans v. Louisiana,* 134 U.S. 1, 10; *Palmer v. Ohio,* 248 U.S. 32, 34; *Duhne v. New Jersey,* 251 U.S. 311, 313, 314."

See, also:

Tinkoff v. Campbell, 86 Fed. Supp. 331.

APPELLANT IS ESTOPPED FROM BRINGING THIS ACTION.

The merits of this cause of action have already been decided in *Ellenberger v. Warren,* found in 90 Cal. App. (2d) 785.

Certainly, as to the appellee Earl Warren this matter is *res judicata.* This Court can take judicial notice of the decision in that case. Further, the appellant is estopped from bringing this action by virtue of the judgment in the decision immediately above referred to. Further, in this proceeding, the appellant cannot properly seek to set aside that judgment by alleging fraud in the original proceedings.

See:

Meader v. Norton, 78 U.S. 442, 457,

wherein the Court states:

> "Unquestionably it is a general rule that when jurisdiction is delegated to a tribunal over a subject-matter, and its exercise is confided to their discretion, the decision of the matter, in the absence of fraud, is in general valid and conclusive. Even fraud will not in every case open the judgment or decree to review where the proceeding is not a direct one, * * *"

See, also:

United States v. Kusche, 56 Fed. Supp. 201,

wherein the Court points out that litigation cannot be made eternal by reopening matters already decided by the mere allegation of fraud somewhere in the proceedings. On page 217 of the Kusche report it is stated:

> " 'On the other hand, the doctrine is equally well settled that the court will not set aside a judgment because it was founded on a fraudulent instrument, or perjured evidence, or for any mat-

ter which was actually presented and considered in the judgment assailed. * * *

"'*But where the same matter has been actually tried, or so in issue that it might have been tried, it is not again admissible; the party is estopped to set up such fraud, because the judgment is the highest evidence, and cannot be contradicted.*'"

THE COMPLAINTS ARE BARRED BY THE STATUTE OF LIMITATIONS.

It is alleged in the complaints that on July 29, 1939, a false autopsy report was filed by the coroner of the City of Oakland. Plaintiff cannot now, twelve years after she first discovered the alleged fraud, seek to have that particular issue adjudicated in this Court. She is guilty of laches and unreasonable delay and the statute of limitations has barred her action as well.

III.

NOTICE OF MOTION TO DISMISS.

Wherefore, the appellees herein hereby give notice to Annie Ellenberger, appellant, that they will move this Honorable Court at the time this case is set for argument:

(1) To dismiss this appeal because this Court lacks jurisdiction over the subject matter of this action.

(2) To dismiss this appeal as frivolous and without merit.

Dated, San Francisco, California,
March 24, 1952.

Respectfully submitted,

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